

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROY CUTLIP,) CV F 99 5778 SMS
)
Plaintiff,) DECISION AND ORDER DENYING
) PLAINTIFF'S SOCIAL SECURITY
) COMPLAINT (Doc. 1)
)
v.) ORDER DIRECTING THE CLERK TO
) ENTER JUDGMENT FOR DEFENDANT
) MICHAEL J. ASTRUE AND AGAINST
) PLAINTIFF ROY CUTLIP
)
MICHAEL J. ASTRUE,)
Commissioner of Social)
Security,)
Defendant.)
)
)

Plaintiff is proceeding with an action in which Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security¹ denying Plaintiff's application for benefits. Pursuant to 28 U.S.C. § 636(c), both parties have consented to the Magistrate's jurisdiction to conduct all proceedings, including ordering the entry of judgment.²

¹Michael J. Astrue is substituted for his predecessor as Commissioner of the Social Security Administration. 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d)(1).

² On March 1, 2000, Judge Oliver W. Wanger reassigned the matter to the undersigned Magistrate Judge for all further proceedings, including the entry of judgment.

1
2 SCOPE AND STANDARD OF REVIEW

3 _____ Congress has provided a limited scope of judicial review of
4 the Commissioner's decision to deny benefits under the Act. In
5 reviewing findings of fact with respect to such determinations,
6 the Court must determine whether the decision of the Commissioner
7 is supported by substantial evidence. 42 U.S.C. § 405(g).

8 Substantial evidence means "more than a mere scintilla,"
9 Richardson v. Perales, 402 U.S. 389, 402 (1971), but less than a
10 preponderance, Sorenson v. Weinberger, 514 F.2d 1112, 1119, n. 10
11 (9th Cir. 1975). It is "such relevant evidence as a reasonable
12 mind might accept as adequate to support a conclusion."

13 Richardson, 402 U.S. at 401. The Court must consider the record
14 as a whole, weighing both the evidence that supports and the
15 evidence that detracts from the Commissioner's conclusion; it may
16 not simply isolate a portion of evidence that supports the
17 decision. Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985).

18 It is immaterial that the evidence would support a finding
19 contrary to that reached by the Commissioner; the determination
20 of the Commissioner as to a factual matter will stand if
21 supported by substantial evidence because it is the
22 Commissioner's job, and not the Court's, to resolve conflicts in
23 the evidence. Sorenson v. Weinberger, 514 F.2d 1112, 1119 (9th
24 Cir. 1975).

25 In weighing the evidence and making findings, the
26 Commissioner must apply the proper legal standards. Burkhart v.
27 Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must
28 review the whole record and uphold the Commissioner's

1 determination that the claimant is not disabled if the
2 Commissioner applied the proper legal standards, and if the
3 Commissioner's findings are supported by substantial evidence.
4 See, Sanchez v. Secretary of Health and Human Services, 812 F.2d
5 509, 510 (9th Cir. 1987); Jones v. Heckler, 760 F.2d at 995. If
6 the Court concludes that the ALJ did not use the proper legal
7 standard, the matter will be remanded to permit application of
8 the appropriate standard. Cooper v. Bowen, 885 F.2d 557, 561 (9th
9 Cir. 1987).

10 ANALYSIS

11 I. Summary of the Proceedings

12 Plaintiff twice filed applications for Social Security
13 Disability benefits and Supplemental Security Disability Income
14 Benefits under Titles II and XVI of the Social Security Act:
15 first in January 1995, and then separately in June 1999. The 1999
16 application resulted in a determination in January 2000 that
17 Plaintiff had been disabled with a residual functional capacity
18 (RFC) for light work as of June 1, 1999. The 1995 application
19 resulted in a determination that Plaintiff had a sedentary RFC
20 but was not disabled; Plaintiff successfully sought judicial
21 review in this Court and obtained an order of remand for an ALJ
22 to consider a relatively limited issue concerning transferability
23 of skills at step five.

24 The decision of the undersigned Magistrate Judge, dated
25 March 15, 2000, directing the remand, stated:

26 Plaintiff's motion for summary judgment is hereby
27 GRANTED as to the issue of remand pursuant to
Sentence 6 of 42 U.S.C. § 405(g). See 42 U.S.C.
28 § 1383(c)(3). Plaintiff's request for an award
of disability benefits IS DENIED. The Commissioner's

1 cross-motion for summary judgment IS DENIED. The
2 Clerk of the Court is hereby directed to enter
3 judgment in favor of the plaintiff.

4 A judgment was subsequently entered on March 20, 2000. The
5 judgment stated:

6 DECISION BY COURT: This action came to trial or hearing
7 before the Court. The issues have been tried or heard
8 and a decision has been rendered.

9 IT IS HEREBY ORDERED AND ADJUDGED that JUDGMENT IS ENTERED
10 IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT.

11 Although the Court referred to sentence six of § 405(g) in the
12 decision, this reference was erroneous. Plaintiff never raised
13 any issue of a remand pursuant to sentence six in the motion for
14 summary judgment, which challenged only the ALJ's finding that
15 Plaintiff had transferable skills with respect to any of the jobs
16 that the ALJ had found that Plaintiff, with an unchallenged
17 sedentary RFC, could perform. The Plaintiff's challenge was that
18 the finding lacked the support of substantial evidence.

19 Plaintiff's motion for summary judgment prayed only for an order
20 reversing the administrative decision in favor of Defendant, or,
21 in the alternative, remanding the matter for a new hearing. (Mot.
22 for Sum. Jmt. filed November 12, 1999; Memo. of Law p. 7.) The
23 nature and terms of the final judgment entered in Plaintiff's
24 favor indicate that the Court intended to issue a final decision
25 on the merits of the matter before it pursuant to sentence four
26 of § 405(g).

27 In connection with the remand, the ALJ was directed by the
28 Appeals Council to consider the intervening finding of
Plaintiff's disability as of June 1999 with a light RFC. Upon
remand, another hearing was held, further evidence was
considered, and on November 6, 2002, Administrative Law Judge

1 Michael J. Haubner issued a decision determining the Plaintiff
2 was not disabled. The Appeals Council stated that it found no
3 reason to assume jurisdiction of the case and so notified
4 Plaintiff on July 20, 2004.

5 However, after the remand and the further decision from the
6 agency, the parties apparently proceeded as if the case was
7 returning to Court after a sentence six remand. Without further
8 order of this Court, Defendant filed on November 23, 2004, a
9 notice of lodging the administrative record and request for the
10 issuance of a new scheduling order in the original case file.

11 (Doc. 18.) The notice stated that the lodging of the record was
12 deemed to be Defendant's answer to the complaint pursuant to the
13 standing scheduling order in Social Security Administration
14 disability benefits appeals. In the notice of lodging and request
15 for scheduling order, Defendant noted that the Court had issued a
16 judgment as if the case was remanded pursuant to sentence four,
17 and stated that the Court's decision and order erroneously set
18 forth that the case was remanded pursuant to sentence six of §
19 405(g). However, Defendant stated that it had treated the case as
20 a sentence six remand. (Notice and Request p. 1 fn. 1.) Defendant
21 noted that the Commissioner had processed the administrative
22 record of the proceedings upon remand and had certified it on
23 September 22, 2004, in order to permit the litigation to move
24 forward. (Id.)

25 Upon conclusion of the remanded proceedings, this Court
26 ordered the clerk to reopen the case as is customarily done in
27 connection with a remand pursuant to sentence six of 42 U.S.C. §
28 405(g), and the Court ordered the issuance of a new scheduling

1 order. Defendant does not assert any immunity or other defense
2 concerning the procedural path on which this case has returned to
3 this Court.

4 Plaintiff filed his brief and memorandum on April 12, 2005.
5 Defendant filed opposition on July 22, 2005. On August 9, 2005,
6 Plaintiff filed his reply.

7 II. Scope of Remand

8 A. Background

9 In the order granting Plaintiff's motion for summary
10 judgment and remanding this case to the agency, filed on March
11 15, 2000 (A.R. 632-40), this Court reviewed the decision of
12 Administrative Law Judge (ALJ) Milan M. Dostal dated August 25,
13 1997 (A.R. 14-22), in which the ALJ rendered an opinion with
14 respect to Plaintiff's application filed on January 10, 1995,
15 alleging onset of disability on May 20, 1994.

16 The ALJ had found that Plaintiff was not disabled; he
17 concluded that Plaintiff's severe impairments of chronic low back
18 pain with degenerative joint and disc disease and degenerative
19 joint disease of the cervical spine, non-specific neurological
20 complaints, bilateral sensory hearing loss, and loss of vision in
21 the left eye were not listed and did not medically equal any
22 listed impairment; Plaintiff had the RFC to perform a full range
23 of sedentary work reduced by exertional and nonexertional
24 limitations such that Plaintiff could lift twenty pounds
25 regularly and thirty pounds occasionally, sit for two hours at a
26 time for a total of eight hours; stand and/or walk for one hour
27 at a time for a total of four hours each, with occasional
28 stooping, bending, squatting, crawling, climbing, or reaching;

1 but was restricted from working around exposure to marked changes
2 in temperature and humidity and dust, fumes and gases, and
3 further had mild restrictions against working around unprotected
4 heights or moving machinery. (A.R. 18-19.) ALJ Dostal concluded
5 that Plaintiff had the RFC to perform sedentary work activity
6 that had not been significantly compromised by exertional or
7 nonexertional limitations. (Id. p. 19.) Based on the testimony of
8 a vocational expert (VE), the ALJ found that Plaintiff was unable
9 to perform his past relevant work. At step five, the ALJ
10 concluded that using the medical-vocational rules 201.20 and
11 201.11 of Table No. 1 of Appendix 2 as a framework for decision,
12 and considering Plaintiff's age (fifty-two years old at the time
13 of the ALJ's decision [A.R. 15]), education, and work experience
14 as well as the testimony of the VE, the ALJ concluded that
15 Plaintiff had transferable skills to perform several jobs
16 available in the national economy, including assembler (60,000
17 jobs), sorter (30,000), and inspector (80,000). (A.R. 20.)

18 In its order granting summary judgment and ordering remand,
19 the Court concluded that, as Plaintiff contended in his opening
20 brief/motion for summary judgment filed on November 12, 1999,
21 there was no evidence supporting the ALJ's conclusion that
22 Plaintiff had transferable skills. The Court stated:

23 Cutlip is correct that individuals in the 50-54 age
24 group with limited education and nontransferable skills
25 are generally found disabled. While Cutlip may have
26 transferable skills, it is unclear whether or not those
skills are transferable to the jobs of assembler, sorter,
and inspector. It is further unclear whether or not these
three jobs are unskilled such that Cutlip would be
deemed uncompetitive for these jobs due to his age.
As such, the Court remands the matter to clarify this.

28 (A.R. 640.) The Court then recited the disposition of the motions

1 before it and directed the clerk to enter judgment as previously
2 quoted.

3 On remand, the Appeals Council of the agency issued the
4 following order on December 11, 2001:

5 The United States District Court has remanded this
6 case to the Commissioner of Social Security for further
7 administrative proceedings in accordance with the fourth
8 sentence of section 205(g) of the Social Security Act.
9 Therefore, the Appeals Council vacates the final decision
10 of the Commissioner of Social Security in this case
11 and remands the case to an Administrative Law Judge
12 for further proceedings consistent with the order of the
13 court. The Administrative Law Judge will provide the
14 claimant an opportunity to appear at a hearing, take
15 any further action needed to complete the administrative
16 record and issue a new decision. The Administrative Law
17 Judge will also consider the finding that the claimant
18 became disabled on June 1, 1999, made in connection with
19 subsequent applications filed on June 11, 1999. All
20 the appropriate records will be obtained.

21 (Emphasis added.) (A.R. 642.)³

22 Upon remand, ALJ Michael J. Haubner held a hearing on
23 October 16, 2002, at which Plaintiff appeared and was represented
24 by an attorney. (A.R. 572.) The ALJ had received before the
25 hearing answers to interrogatories from Thomas Dachelet, a VE,
26 concerning Plaintiff's past relevant work and transferable
27 skills. (A.R. 572, citing to Exhibits 4E and 5E, at A.R. 678-
28 688.) The ALJ issued a decision dated November 6, 2002 (A.R. 572-
578), in which he acknowledged that the Court's order directed
remand because the ALJ did not completely address the issue of
transferable skills, and that he had been instructed to clarify

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1 whether Plaintiff had skills transferable to the jobs of
2 assembler, sorter, and inspector. (A.R. 572.) He further noted
3 the instruction to consider the finding that Plaintiff had been
4 found to have been disabled on June 1, 1999, in connection with
5 subsequent applications filed on June 11, 1999. (Id.) The ALJ
6 considered the relevant time period to be from May 20, 1994 (the
7 date on which Plaintiff in the first application had alleged that
8 he initially became disabled), until May 31, 1999 (the day before
9 the date upon which Plaintiff had been determined with reference
10 to the second application in the interim to have become
11 disabled). (Id.)

12 Instead of simply receiving and considering evidence from
13 the VE regarding the transferability of Plaintiff's skills and
14 then further considering the subsequent finding of Plaintiff's
15 disability, the ALJ additionally took into evidence medical
16 records covering the period from May 3, 1995 to September 14,
17 1995 from U.C. Irvine Medical Center (A.R. 689-731); records from
18 Sutter Merced Medical Center from April 18, 1997 through
19 September 13, 1999 (A.R. 733-813); a report of an internal
20 medicine consultative examination dated November 20, 1999, by
21 Usman Ali, M.D. (A.R. 814-17) (a report thus dated approximately
22 six months after the period of disability pertinent to
23 Plaintiff's original application), and an RFC assessment by state
24 agency physician dated December 31, 1999 and consultation request
25 dated January 3, 2000 (A.R. 818-27) (items likewise occurring
26 seven or more months beyond the pertinent period).

27 In his decision of November 2002, the ALJ not only addressed
28 sequential evaluation step five, but he also re-adjudicated

1 sequential evaluation step two⁴ as well as Plaintiff's previously
2 unchallenged RFC, elevating it from sedentary to light. (A.R.
3 573.) The ALJ re-evaluated evidence that had been evaluated in
4 the initial opinion, including the evidentiary basis of the
5 initial sedentary RFC. (A.R. 574.) He also considered evidence
6 emanating from time periods before and after the pertinent
7 period. (A.R. 574-75.) He considered transferability of skills to
8 new positions addressed by the VE based on the new RFC of light
9 work, including a stage setting painter and railroad car
10 letterer; he also considered the availability of unskilled
11 sedentary and light positions in the economy based on assumptions
12 consistent with the new, less restrictive RFC. (A.R. 575-76.)

13 The ALJ did make findings regarding the transferability of
14 Plaintiff's skills to the jobs identified in the original
15 decision which resulted in the remand:

16 I posed a hypothetical question to Mr. Dachelet based
17 upon the sedentary residual functional capacity found
18 by the Administrative Law Judge in the vacated August
19 29, 1997 hearing (Exhibits 4E, p. 2 and Exhibits 84-95).
He concluded that there were no jobs at the sedentary
level that would use the claimant's past relevant work
skills (Exhibit 4E, p. 1A).

20 (A.R. 576.) He then proceeded to apply the medical vocational
21 rules in light of Plaintiff's light RFC during the relevant
22 period and found that he was not disabled because his limitations
23 did not significantly affect his ability to perform a broad range
24 of light work. (A.R. 576.)

25 On January 2, 2003, Plaintiff sought review by the Appeals
26 Council of the ALJ's decision of November 2002. (A.R. 566.)

27
28 ⁴ He did not list degenerative joint disease of the cervical spine as a severe impairment, contrary to the
unchallenged findings of the initial ALJ.

1 Plaintiff argued that upon remand the ALJ had exceeded the scope
2 of the Court's order, had violated the law of the case, and had
3 made unnecessary findings pursuant to the Court's order of remand
4 and the order of the Appeals Council directing further
5 proceedings consistent with the Court's order. (A.R. 561-63.)

6 B. Law of the Case, Res Judicata, Collateral Estoppel

7 Plaintiff argues that the ALJ exceeded the proper scope of
8 the remand directed by this Court and failed to follow the law of
9 the case when he ordered a new consultative examination, held
10 another hearing, and found on the basis of additional evidence
11 that Plaintiff had a light RFC instead of the previously
12 unchallenged sedentary RFC that had been based on Dr. Moattari's
13 opinion. Further, the ALJ undertook actions inconsistent with the
14 Court's express and implied findings.⁵

15 Defendant counters that the ALJ properly questioned the VE
16 about Dr. Moattari's RFC. Further, pursuant to 20 C.F.R. §§
17 404.977 and 416.1477, the additional consultative medical
18 assessment by Dr. Han was appropriate in that it was consistent
19 with the orders of this Court and the Appeals Council, which
20 remanded the case for proceedings consistent with the Court's
21 order, including taking any action needed to complete the
22 administrative record and issue a new decision. Defendant asserts
23 that the Ninth Circuit has not determined the applicability of
24 the doctrine of the law of the case to administrative agencies on
25

26 _____
27 ⁵ Plaintiff notes that at step two, the ALJ failed to include degenerative joint disease of the cervical spine as
28 one of Plaintiff's severe impairments (A.R. 577), whereas the first decision of the ALJ included such an impairment;
and at step three, the ALJ readjudicated Plaintiff's RFC (which had been an unchallenged sedentary RFC under the
first decision of the ALJ) and determined that he had a light RFC (as had been the finding in the separate proceeding
in which Plaintiff had been found to have been subsequently disabled).

1 remand; in any event, whether based on either Dr. Moattari's
2 original RFC, or the augmented RFC after further hearing, the
3 conclusion that Plaintiff was not disabled was supported by
4 substantial evidence.

5 The doctrine of the law of the case has been summarized as
6 follows:

7 "The law of the case doctrine is a judicial
8 invention designed to aid in the efficient operation
9 of court affairs." Milgard Tempering, Inc. v. Selas Corp.
10 of Am., 902 F.2d 703, 715 (9th Cir.1990). Under the
11 doctrine, a court is generally precluded from
12 reconsidering an issue previously decided by
13 the same court, or a higher court in the identical
14 case. See id. For the doctrine to apply, the issue in
15 question must have been "decided explicitly
16 or by necessary implication in [the] previous
17 disposition." Liberty Mutual Ins. Co. v. EEOC,
18 691 F.2d 438, 441 (9th Cir.1982). Application of the
19 doctrine is discretionary. See United States v. Mills, 810
20 F.2d 907, 909 (9th Cir.1987). A trial judge's decision
21 to apply the doctrine is thus reviewed for an abuse
22 of discretion. See Milgard Tempering, 902 F.2d at 715.

23 United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir.
24 2000); see Sibald v. United States, 37 U.S. 388, 492 (1838).

25 A court abuses its discretion in applying the law of the
26 case doctrine only if (1) the first decision was clearly
27 erroneous; (2) an intervening change in the law occurred; (3) the
28 evidence on remand was substantially different; (4) other changed
circumstances exist; or (5) a manifest injustice would otherwise
result. United States v. Lummi Indian Tribe, 235 F.3d at 452-53
(citing United States v. Cuddy, 147 F.3d 1111, 1114 (9th Cir.
1998)).

No case has been cited to the Court or found in which the
Ninth Circuit Court of Appeals has determined the applicability

1 of the doctrine of the law of the case in SSA cases.⁶ Some courts
2 have applied the law of the case doctrine to SSA cases, ruling
3 that when conducting further proceedings after remand from a
4 court for insufficiency of the evidence to support a finding, the
5 SSA must conform its further proceedings to the principles set
6 forth in the judicial decision, and must not revisit issues that
7 were actually or implicitly decided by the court that directed
8 remand unless there is a compelling reason to depart therefrom;
9 new evidence adduced on remand that undermined the previous
10 ruling on sufficiency could constitute a compelling reason to
11 depart from a previous ruling. See Wilder v. Apfel, 153 F.3d 799,
12 803-04 (7th Cir. 1998).

13 District courts within this circuit have applied the
14 principles of judicial economy and finality embodied in the
15 doctrine of the law of the case to SSA proceedings upon review of
16 a matter previously remanded pursuant to sentence four of §
17 405(g). See Ruiz v. Apfel, 24 F.Supp.2d 1045, 1050 (C.D.CA 1998)
18 (where the ALJ in the first administrative proceeding had
19 determined that Plaintiff could not perform her past relevant
20 work, when the case was remanded to the SSA with specific
21 directions to make detailed credibility findings such that the
22 taking or accepting of additional evidence was within the

23

24 ⁶The Ninth Circuit Court of Appeals has cited with approval
25 Chrupcala v. Heckler, 829 F.2d 1269 (3d Cir. 1987), where it was
26 decided that issues decided by an ALJ and not appealed by any
27 party were not subject to redetermination on a remand; the decision in
28 Chrupcala was based on 20 C.F.R. § 404.969 and the passage of the
initial sixty-day period in 42 U.S.C. § 405(g), which grants
initial jurisdiction to appeal. Rice v. Sullivan, 912 F.2d 1076,
1080-81 (9th Cir. 1990), overruled on other grounds Bunnell v.
Sullivan, 947 F.2d 341 (9th Cir. 1991).

1 discretion of the ALJ if helpful to his credibility findings, it
2 was held that the ALJ exceeded his authority on remand by
3 considering and deciding again the issue at step four that had
4 previously been decided in Plaintiff's favor and not appealed);
5 Pearson v. Chater, 1997 WL 314380 (N.D.Cal. 1997), affirmed 141
6 F.3d 1178 (9th Cir. 1998) (where a case was remanded to the SSA
7 for insufficient evidence with directions to determine if the
8 claimant was capable of sedentary work, the SSA again determined
9 that Plaintiff was not disabled, and the claimant again brought
10 the case before the district court, it was concluded that
11 pursuant to the law of the case the district court's
12 determination in its first review that a rejection of a specific
13 doctor's opinion was supported by substantial evidence would not
14 be re-examined by the court where although additional evidence by
15 the doctor was presented before the SSA at the hearing upon
16 remand, no substantially different evidence was presented by the
17 doctor, and no evidence presented at the second hearing changed
18 any of the factors that had resulted in the ALJ's finding during
19 the initial hearing that the doctor was not to be credited).

20 It has also been held elsewhere that an ALJ exceeds the
21 permissible scope of remand where the remand was for the specific
22 purpose of determining whether or not there were jobs that
23 Plaintiff could perform with a specific limitation on the
24 Plaintiff's left dominant hand, but the ALJ redetermined that
25 Plaintiff's impairment was not severe, Ozbun v. Callahan, 968
26 F.Supp. 478, 480 (S.D.Iowa 1997).

27 On the other hand, some courts have determined that given
28 the statutory scheme, the more appropriate principles to govern

1 the permissible scope of remand proceedings are those of res
2 judicata or collateral estoppel. It has been held that because a
3 district court's order remanding a case to the SSA is a final
4 judgment, see 42 U.S.C. § 405(h),⁷ Melkonyan v. Sullivan, 501
5 U.S. 89, 97-98, 101-02 (1991), and Shalala v. Schaefer, 509 U.S.
6 292, 297-98 (1993), the case that results when the findings on
7 remand are brought back to a district court pursuant to § 405(g)
8 is not the same litigation within the meaning of the doctrine of
9 the law of the case, and thus principles of res judicata or
10 collateral estoppel are more appropriately applied. Hollins v.
11 Apfel, 160 F.Supp.2d 834, 840 (S.D.Ohio 2001). Absent evidence of
12 an improvement in a claimant's condition, principles of res
13 judicata apply to preclude relitigation of a case, and the
14 principle of collateral estoppel applies to preclude litigation
15 of an issue, by a party or one in privity with a party where the
16 case or issue has resulted, or could have resulted, in a decision
17 on the merits that has become final. See Drummond v. Commissioner
18 of Social Security, 126 F.3d 837, 840-843 (6th Cir. 1997), and
19 authorities there cited. This is a foreseeable and appropriate
20 application of the established rule that when an administrative
21 agency acts in a judicial capacity and resolves disputed issues
22 of fact properly before it which the parties have had an
23 opportunity to litigate, the courts will apply res judicata.
24 United States v. Utah Const. & Mining Co., 384 U.S. 394, 422
25 (1966).

27 ⁷ Section 405(h) provides in pertinent part, "The findings and decision of the Commissioner of Social
28 Security after a hearing shall be binding on all individuals who were parties to such hearing. No findings of fact or
decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency
except as herein provided...."

1 In this circuit, res judicata is not applied rigidly in
2 administrative proceedings, and it has been recognized that
3 application of it may not be appropriate where in connection with
4 a determination on the merits the claimant has submitted new
5 evidence to demonstrate that a prior finding was not correct. See
6 Gregory v. Bowen, 844 F.2d 664, 665-66 (9th Cir. 1988).

7 In the absence of clear guidance as to which particular
8 principle governs, the Court notes that under either doctrine,
9 the scope of the remand to the ALJ is defined by the Court's
10 order of remand and the proceedings undertaken thereafter,
11 including the presentation and consideration of additional
12 evidence undertaken by the participants in the proceedings.
13 Further, both doctrines are premised upon a recognition of the
14 need to accord finality to both administrative and judicial
15 proceedings in appropriate circumstances; the policy in favor of
16 conserving the resources of the agency, the Court, and the
17 parties; and the need to achieve fair determinations by orderly
18 procedures.

19 The Court's remand order in CV F 00 5962 SMS, dated February
20 13, 2001, authorized the Commissioner to obtain the testimony of
21 a VE based on Dr. Moattari's RFC, and further to consider
22 disability based on that evidence; it did not expressly preclude
23 presentation or consideration of additional evidence. The Appeals
24 Council's order of January 10, 2002, was consistent with the
25 Court's remand order because it simply specified the need to
26 provide Plaintiff an opportunity to appear at a hearing, complete
27 the record, and issue a new decision. It also referred to the
28 intervening, separate adjudication of Plaintiff as disabled with

1 a light RFC as of June 1, 1999, made in connection with
2 subsequent applications filed on June 11, 1999.

3 The ALJ appropriately determined that the remand order
4 required him to take the VE's testimony and to determine if there
5 were any jobs that Plaintiff could perform in the national
6 economy. The taking of the VE's testimony was consistent with the
7 scope of the remand defined by the Court's remand order.

8 Plaintiff complains that the VE ordered a consultative exam
9 and considered the opinions resulting therefrom. Whether viewed
10 as a challenge to that specific evidence, or as a more general
11 challenge to the taking of any evidence other than the VE's
12 testimony, it is inconsistent with Plaintiff's own position at
13 the hearing after remand where he apparently sought to have
14 medical records of additional and later treatment to be
15 considered in his own behalf to corroborate and explain Dr.
16 Moattari's RFC findings regarding Plaintiff's ability to bend.
17 Further, Plaintiff did not object to the admission of Dr. Han's
18 report or any other exhibits. (A.R. 587.)

19 Plaintiff also acquiesced in the apparent scope of the
20 hearing as articulated by the ALJ. The ALJ noted at the beginning
21 of the hearing that Plaintiff had been receiving Title XVI
22 benefits since June 1999. (A.R. 591.) Plaintiff's counsel did not
23 appear to have any objection at the hearing to the ALJ's
24 consideration of Title II issues; indeed, Plaintiff waived any
25 reading of the issues and acquiesced in the ALJ's consideration
26 of the current period under Title II. (A.R. 591-92.) Although
27 Plaintiff sought to have Moattari's RFC followed, he also sought
28 to clarify or augment it with his treating physician's assessment

1 and parts of the consulting examiner's assessment. Plaintiff's
2 counsel was informed that the prior hearing had been vacated and
3 that counsel would be given wide latitude on examination. (A.R.
4 595.) Plaintiff's counsel undertook, without objection or
5 expression of any limitation, an examination of Plaintiff with
6 respect to his disabilities and tolerances from all of his
7 multiple problems between May 1994 (his alleged onset date)
8 through the end of 1999 (when Plaintiff had been found disabled
9 for purposes of Title XVI). (A.R. 595-96, 596-619.)

10 It appears that in the interests of reaching a fully
11 informed and fair determination, the Plaintiff and the ALJ
12 proceeded to introduce and consider additional evidence in light
13 of the separate finding that Plaintiff was disabled with a light
14 RFC. Such a manner of proceeding is consonant with firmly
15 established policy. The SSA is based on an investigatory model;
16 its proceedings are inquisitorial and not adversarial in nature.
17 The ALJ generally is obligated to investigate facts and develop
18 arguments for and against granting benefits. Sims v. Apfel, 530
19 U.S. 103, 110-11 (2000). The regulations specify that at a
20 disability hearing the ALJ will "look fully into the issues" and
21 that the ALJ "may stop the hearing temporarily and continue it at
22 a later date if he or she believes that there is material
23 evidence missing." 20 C.F.R. §§ 404.944, 416.1444. Further, 20
24 C.F.R. §§ 404.977 and 416.1477 provide that in a case remanded by
25 the Appeals Council, the ALJ shall take any action that is
26 ordered by the Appeals Council and may take any additional action
27 that is not inconsistent with the Appeals Council's remand order.
28 Specifically, §§ 404.983 and 416.1483 expressly provide that in

1 cases where a federal court remands a case to the Commissioner
2 for further consideration, any issues relating to the claim may
3 be considered by the ALJ whether or not they were raised in the
4 administrative proceedings leading to the final decision in the
5 case.

6 In view of the considerable additional evidence submitted at
7 the hearing without objection by the Plaintiff, the scope of
8 Plaintiff's counsel's examination at the hearing, the lack of any
9 objection at the administrative level to the scope of the
10 proceedings, and the pertinent policies, the Court concludes that
11 the present case is not an appropriate one for the application of
12 the law of the case, res judicata, or collateral estoppel. There
13 is no indication of any arbitrary or excessive conduct on the
14 part of the ALJ or any significant or substantial challenge to
15 the jurisdiction of the Court. The Court will consider the
16 parties' contentions concerning the issues determined by the ALJ
17 upon remand.

18 C. Consultative Examination

19 The Court finds no abuse of discretion or excess of
20 authority in the ALJ's decision to obtain another consultative
21 exam. The Court concludes that the uncertainty and ambiguity of
22 Moattari's RFC was revealed once the VE on remand testified to
23 the differing conclusions as to the availability of jobs that
24 Plaintiff could perform depending on the extent of Moattari's
25 unspecified limitations on pushing and pulling.

26 Within the framework of the regulations, the Commissioner
27 has broad latitude in ordering a consultative examination. Reed
28 v. Massanari, 270 F.3d 838, 842 (9th Cir. 2001) (citing Diaz av.

1 Sec'y of Health and Human Servs., 898 F.2d 774, 778 (10th Cir.
2 1990)). It is appropriate to request a consultative exam where
3 needed additional evidence is not contained in the records of the
4 claimant's medical sources, 20 C.F.R. §§404.1519a(b)(1),
5 416.919a(b)(1), or where there is a conflict, inconsistency,
6 ambiguity or insufficiency in the evidence that must be resolved
7 and that cannot be resolved by recontacting the claimant's
8 medical source, 20 C.F.R. §§404.1519a(b)(4), 416.919a(b)(4). Reed
9 v. Massanari, 270 F.3d at 842 (citing Hawkins v. Chater, 113 F.3d
10 1162, 1166 (10th Cir. 1997)). In light of Plaintiff's desire to
11 present additional evidence beyond Dr. Moattari's opinion, and in
12 view of the clear need to obtain specialized, updated data and
13 expert opinions to clarify or amplify Dr. Moattari's RFC, the
14 ALJ's seeking a consultative exam from an orthopaedic specialist
15 was not an abuse of discretion.

16 In any event, the ALJ's decision shows that the report from
17 the consultative exam was used to clarify and update Dr.
18 Moattari's RFC, and not to disregard it. The actions taken by the
19 ALJ were thus consistent with the Court's order of remand and
20 were taken to effectuate the Court's order.

21 III. Rejection of Plaintiff's Subjective Complaints

22 Plaintiff argues that the ALJ's rejection of Plaintiff's
23 credibility was improper because the reasons given for the ALJ's
24 conclusion were not clear and convincing.

25 The existence and severity of a person's reaction to a
26 physical ailment, such as the existence and severity of pain, are
27 subjective phenomena, the extent of which cannot be objectively
28 measured. Byrnes v. Shalala, 60 F.3d 639, 642 (9th Cir. 1995). In

1 order to reject a claimant's subjective complaints, the ALJ must
2 provide specific, cogent reasons for the disbelief. Lester v.
3 Chater, 81 F.3d 821, 834 (9th Cir. 1995). Once the claimant
4 introduces medical evidence of an underlying impairment that
5 could reasonably be expected to produce some degree of the
6 subjective symptoms, the Commissioner may not discredit the
7 claimant's testimony as to subjective symptoms merely because
8 they are unsupported by objective evidence such as objective
9 medical findings. Id.; Smolen v. Chater, 80 F.3d 1273, 1282 (9th
10 Cir. 1996). Unless there is affirmative evidence tending to show
11 that the claimant is malingering, the reasons for rejecting the
12 claimant's testimony must be clear and convincing, and the ALJ
13 must set forth the rejection by identifying what testimony is not
14 credible and what evidence undermines the claimant's complaints.
15 Lester v. Chater, 81 F.3d at 834. The findings of the adjudicator
16 must be properly supported by the record and must be sufficiently
17 specific to allow a reviewing court to conclude that the
18 adjudicator rejected the claimant's testimony on permissible
19 grounds and did not arbitrarily discredit a claimant's testimony.
20 Bunnell v. Sullivan, 947 F.2d 341, 345-46; Byrnes v. Shalala, 60
21 F.3d at 641-42 (9th Cir. 1995); see 20 C.F.R. § 404.1529(c)
22 [disability] and 20 C.F.R. § 416.929(c) [supplemental security
23 income].

24 Social Security Ruling 96-7p directs the adjudicator to
25 consider not only objective medical evidence of signs, laboratory
26 findings, and medical opinions, but also the following factors
27 when assessing the credibility of an individual's statements:

28 1. The individual's daily activities;

- 1 2. The location, duration, frequency, and intensity
- 2 of the individual's pain or other symptoms;
- 3 3. Factors that precipitate and aggravate the symptoms;
- 4 4. The type, dosage, effectiveness, and adverse
- 5 side effects of any medication for pain or other
- 6 symptoms;
- 7 5. Treatment, other than medication, for relief of
- 8 pain or other symptoms;
- 9 6. Any measures other than treatment used by the
- 10 individual to relieve the pain or other symptoms; and
- 11 7. Any other factors concerning the individual's
- 12 functional limitations and restrictions due to
- 13 pain or other symptoms.

14 See also Bunnell v. Sullivan, 947 F.2d at 346.

15 The ALJ recited Plaintiff's subjective complaints. (A.R.
16 575.) He noted that Plaintiff testified that at the pertinent
17 time, he had been unable to bend, stoop, twist, or climb; his
18 severe leg and back pain increased with any activity; he could
19 lift and carry ten to twenty pounds, sit twenty-five to thirty-
20 five minutes, stand thirty to forty-five minutes, and walk twenty
21 to thirty minutes; he would have to lie down for an hour and one-
22 half to two hours if he walked. He was blind in his left eye.
23 (AR. 575.)

24 The ALJ expressed his credibility findings and the factors
25 that he found detracted from Plaintiff's credibility. (A.R. 573-
26 75.) The ALJ found that during the five-year period, Plaintiff
27 had impairments that reasonably could be expected to produce some
28 of his symptoms. (A.R. 573.) However, the degree of limitation
Plaintiff alleged was not supported by the objective medical
evidence and was not entirely credible when evaluated under the
pertinent legal standards. (Id.)

29 The ALJ chronicled the medical history, consisting largely
30 of treatment notes and reports concerning slight degenerative
31 changes of the lumbar spine with subjective lower extremity
32

1 radiculopathy but no acute spinal cord compression; only mild
2 degenerative changes of the right knee in May 1999; pulmonary
3 function tests in February 1997 and October 1998 showing only
4 mild chronic obstructive pulmonary disease with significant
5 improvement after bronchodilator and no significant
6 abnormalities; mitral valve prolapse, but no mitral
7 regurgitation, and bilateral coronary angiograms showing only
8 some luminal plaque and no occlusive lesion; and only mild
9 gastritis. Plaintiff was advised in October 1998 to stop smoking.
10 (A.R. 573-74.) Although the inconsistency of objective findings
11 with subjective claims may not be the sole reason for rejecting
12 subjective complaints of pain, Light v. Chater, 119 F.3d 789, 792
13 (9th Cir. 1997), it is one factor which may be considered with
14 others, Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004);
15 Morgan v. Commissioner 169 F.3d 595, 600 (9th Cir. 1999). The ALJ
16 appropriately considered the longitudinal, objective medical
17 evidence, which constituted a clear and convincing reason for
18 rejecting the extent of Plaintiff's subjective claims.

19 The ALJ mentioned agreed medical examiner Dr. Kucera, who in
20 October 1994 concluded that Plaintiff's injuries did not prevent
21 him from returning to work as a production worker or small parts
22 assembly person. (A.R. 573.) A doctor's opinion that a claimant
23 can work is appropriately considered. Moncada v. Chater, 60 F.3d
24 521, 524 (9th Cir. 1995).

25 The ALJ stated that although Plaintiff testified that he had
26 chronic obstructive pulmonary disease, he used only inhalers and
27 not a nebulizer; he had never been hospitalized for the
28 condition. (A.R. 575.) Plaintiff also admitted that with respect

1 to his right carpal tunnel syndrome, he obtained a wrist brace
2 for the condition only in late 1998 or early 1999 and wore it
3 only one year; and he had never had carpal tunnel release. (A.R.
4 575.) An ALJ may rely on the conservative nature of treatment or
5 a lack of treatment in rejecting a claimant's subjective
6 complaint. Johnson v. Shalala 60 F.3d 1428, 1433-34 (9th Cir.
7 1995). The record supported the conclusion that Plaintiff's
8 impairments were not as debilitating as claimed because of the
9 conservative and routine nature of the treatment.

10 The ALJ noted the finding of Dr. Weber, a consulting
11 physician, made in April 1995 that although Plaintiff exhibited
12 significant paraspinous muscle spasm and restricted movement of
13 the lumbar spine, he had an exaggerated response to light touch
14 in the lower back area; appropriate treatment was anti-
15 inflammatory and analgesic medications. (A.R. 573.) The ALJ noted
16 the opinion of treating physician Sanseau in November 1998 that
17 Plaintiff's complaints of chest pressure might be due in part to
18 nerves; Dr. Sanseau recommended relaxation exercises. (A.R. 574.)
19 He noted that agreed medical examiner Kucera, chosen by
20 Plaintiff, had noted in his October 1994 report that Plaintiff's
21 subjective complaints were significantly greater than his
22 objective findings. (A.R. 575.) As Defendant notes, evidence that
23 a claimant amplifies his symptoms supports rejection of the
24 claimant's subjective complaint. Matthews v. Shalala, 10 F.3d
25 678, 680 (9th Cir. 1993).

26 The ALJ relied on the fact that although Plaintiff had
27 earlier indicated that he could not read and could not write more
28 than his name, he testified that he could write a brief telephone

1 message and read twenty-five per cent of the newspaper daily,
2 although he did not always understand what he read. (A.R. 575.)
3 Inconsistent statements are matters generally considered in
4 evaluating credibility and are properly factored in evaluating
5 the credibility of a claimant with respect to subjective
6 complaints. Included in the factors that an ALJ may consider in
7 weighing a claimant's credibility are the claimant's reputation
8 for truthfulness; inconsistencies either in the claimant's
9 testimony or between the claimant's testimony and the claimant's
10 conduct, daily activities, or work record; and testimony from
11 physicians and third parties concerning the nature, severity, and
12 effect of the symptoms of which the claimant complains. Thomas v.
13 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). The ALJ may
14 consider whether the Plaintiff's testimony is believable or not.
15 Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999). Although
16 Plaintiff argues that the inconsistency was only technical, it
17 was for the ALJ to evaluate the weight to be placed on the
18 inconsistency.

19 In the present case, the ALJ relied on multiple clear and
20 convincing reasons, supported by substantial evidence in the
21 record, for rejecting the extent of Plaintiff's claimed
22 subjective limitations. Cf. Batson v. Commissioner of the Social
23 Security Administration, 359 F.3d 1190, 1196 (9th Cir. 2004).

24 IV. Sufficiency of the Evidence Supporting the Light RFC

25 The ALJ determined that Plaintiff met the insured status
26 requirements of the Act for entitlement to a period of disability
27 and disability insurance benefits if the evidence established
28 that Plaintiff was under a disability on or before March 31,

1 1999. (A.R. 573.)

2 Plaintiff argues that the finding that his RFC was light
3 during the period between May 20, 1994 through May 31, 1999,
4 lacked the support of substantial evidence. Plaintiff contends
5 that the evidence supporting a light RFC was insubstantial
6 because the opinions relied upon were "dated," or were rendered
7 just without and just within the early part of the period.

8 An ALJ may disregard a treating physician's opinion that is
9 controverted by other opinions only by setting forth specific,
10 legitimate reasons for doing so that are based on substantial
11 evidence in the record. Rodriguez v. Bowen, 876 F.2d 759, 762
12 (9th Cir. 1989). This burden is met by stating a detailed and
13 thorough summary of the facts and conflicting clinical evidence,
14 stating the interpretation of the evidence, and making findings.
15 Cotton v. Bowen, 799 F.2d 1403, 1408 (9th Cir 1986). However, if
16 the medical opinion of a claimant's treating physician is
17 uncontroverted, then an ALJ must present clear and convincing
18 specific reasons, supported by substantial evidence in the
19 record, for rejecting the uncontroverted medical opinion of a
20 claimant's treating physician. Holohan v. Massanari, 246 F.3d
21 1195, 1203 (9th Cir. 2001). A failure to set forth a reasoned
22 rationale for disregarding a particular treating physician's
23 findings is legal error. Cotton v. Bowen, 799 F.2d at 1408.

24 The medical opinion of a nontreating doctor may be relied
25 upon instead of that of a treating physician only if the ALJ
26 provides specific and legitimate reasons supported by substantial
27 evidence in the record. Holohan v. Massanari, 246 F.3d 1195, 1202
28 (9th Cir. 2001) (citing Lester v. Chater, 81 F.3d 821, 830 (9th

1 Cir. 1995)). The contradictory opinion of a nontreating but
2 examining physician constitutes substantial evidence, and may be
3 relied upon instead of that of a treating physician, where it is
4 based on independent clinical findings that differ from those of
5 the treating physician. Andrews v. Shalala, 53 F.3d 1035, 1041
6 (9th Cir. 1995). The opinion of a nontreating, nonexamining
7 physician can amount to substantial evidence as long as it is
8 supported by other evidence in the record, such as the opinions
9 of other examining and consulting physicians, which are in turn
10 based on independent clinical findings. Andrews v. Shalala, 53
11 F.3d at 1041.

12 The ALJ credited the opinion of agreed medical examiner Dr.
13 Kucera rendered on October 12, 1994 that Plaintiff could still
14 perform his past relevant work as a production worker or small
15 parts assembly person (A.R. 573.)

16 The ALJ noted the opinion of a medical expert who testified
17 at the first hearing (Dr. Carl Leslie Heyn, who practiced
18 orthopedic medicine with board certification in physical medicine
19 and rehabilitation [AR. 70]), that Plaintiff had a sedentary RFC;
20 however, the ALJ noted that the only rationale cited by the
21 expert to justify the restrictive RFC was the Plaintiff's
22 subjective complaints of chronic low back pain, arthritis and
23 discogenic problems based on Plaintiff's medical records. (A.R.
24 574.) Where the record supports an ALJ's rejection of the
25 claimant's credibility as to subjective complaints, the ALJ is
26 free to disregard a doctor's opinion that was premised upon the
27 claimant's subjective complaints. Tonapetyan v. Halter, 242 F.3d
28 1144, 1149 (9th Cir. 2001). The ALJ's rejection of this earlier

1 opinion was supported by a specific and legitimate reason that in
2 turn was supported by substantial evidence in the record.

3 Another reason expressed for the ALJ's placing limited
4 weight on that opinion was because the expert had not been an
5 examining physician; the ALJ expressly gave greater weight to the
6 October 1994 opinion of Dr. Kucera, an examining physician, that
7 established that Plaintiff's disability of the lower back and
8 extremities precluded only very heavy work. (A.R. 574, 277-87.)
9 The opinion of an examining physician is entitled to greater
10 weight than the opinion of a nonexamining physician. Lester v.
11 Chater, 81 F.3d 821, 830 (9th Cir. 1995). The uncontradicted
12 opinion of an examining physician may be rejected only if the
13 Commissioner provides clear and convincing reasons for rejecting
14 it. Id.; Edlund v. Massanari, 253 F.3d 1152, 1158-59 (9th Cir.
15 2001). The opinion of a nontreating but examining physician
16 constitutes substantial evidence, and may even be relied upon
17 instead of the contradictory opinion of a treating physician,
18 where it is based on independent clinical findings that differ
19 from those of the treating physician. Andrews v. Shalala, 53 F.3d
20 1035, 1041 (9th Cir. 1995).

21 The ALJ likewise stated that he gave greater weight to the
22 opinion of consulting examiner Usman Ali, who was board-certified
23 in internal medicine, in November 1999 to the effect that
24 Plaintiff could lift and carry twenty-five to thirty pounds
25 occasionally and twenty pounds frequently; sit for a normal
26 workday; and stand and walk with breaks every one to two hours
27 with possible difficulty pushing, pulling heavy objects,
28 climbing, repeatedly bending, stooping, crouching, and crawling.

1 (A.R. 574, 814-18.) Again, Dr. Ali performed a comprehensive
2 internal medicine evaluation of Plaintiff. (A.R. 814.)

3 Further, he relied on the state agency medical consultants'
4 conclusion in 1992 that Plaintiff could lift and carry twenty
5 pounds occasionally and ten pounds frequently with occasional
6 stooping, crouching, kneeling, crawling, climbing, and balancing;
7 and their opinion in 1995 that Plaintiff could perform the full
8 range of medium work involving lifting and carrying fifty pounds
9 occasionally and twenty-five pounds frequently. (A.R. 574-75,
10 163-70.) The ALJ noted that these opinions were not inconsistent
11 with the November 1999 determination of disability due to the
12 fact that the disability finding was based on the Plaintiff's age
13 at the time (fifty-five years or older). (A.R. 575.) The opinions
14 constituted substantial evidence because they were supported by
15 specific clinical findings. The opinion of a nontreating,
16 nonexamining physician can amount to substantial evidence as long
17 as it is supported by other evidence in the record, such as the
18 opinions of other examining and consulting physicians, which are
19 in turn based on independent clinical findings. Andrews v.
20 Shalala, 53 F.3d at 1041.

21 The fact that some of the evidence relied on by the ALJ was
22 beyond the strict confines of the pertinent period is not
23 sufficient to render it insubstantial. This is because in the
24 instant case, the ALJ considered the longitudinal history of
25 residual functional capacity assessments, a body of evidence that
26 reflected RFC assessments of at least light work for a lengthy
27 period (October 1994 through November 1999). This evidence
28 strongly supports a finding that Plaintiff was capable of

1 performing light work throughout the entire period. Plaintiff
2 himself concedes that the evidence outside of the strict period
3 itself is not irrelevant. (Reply Br. P. 7.)

4 Likewise, the fact that the ALJ rejected the opinion of a
5 rehabilitation specialist (Dr. Heyn) and instead valued the
6 opinion of an internal medicine specialist is not necessarily
7 determinative. Specialty is but one factor to be considered in
8 the assignment of weight to expert opinions. Although there was
9 some evidence that would have supported a sedentary RFC, the ALJ
10 reasonably relied on expert opinions that constituted substantial
11 evidence in support of a light RFC.

12 DISPOSITION

13 Based on the foregoing, the Court concludes that the ALJ's
14 decision was supported by substantial evidence in the record as a
15 whole and was based on proper legal standards.

16 Accordingly, the Court AFFIRMS the administrative decision
17 of the Defendant Commissioner of Social Security and DENIES
18 Plaintiff's Social Security complaint.

19 The Clerk of the Court IS DIRECTED to enter judgment for
20 Defendant Michael J. Astrue, Commissioner of Social Security,
21 and against Plaintiff Roy Cutlip.

22 IT IS SO ORDERED.

23 Dated: July 13, 2007

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE